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JULY 31 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARK ALLAN SHANNON, Appellant.	2 CA-CR 2007-0230 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063404

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

Emily Danies
Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 Appellant Mark Allan Shannon was charged with sale of a dangerous drug and transportation of a dangerous drug for sale. A jury found him not guilty of the transportation offense but guilty of sale of a dangerous drug. On appeal, he contends the trial court erred

when it denied his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., made after the close of the state's case and re-urged after he testified. Shannon also challenges the reasonable doubt instruction the trial court gave to the jury in accordance with *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). We affirm.

¶2 "A judgment of acquittal is appropriate only when there is no substantial evidence to prove each element of the offense and support the conviction." *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007); *see also* Ariz. R. Crim. P. 20(a). In reviewing the evidence to determine whether it is sufficient "to withstand a Rule 20 motion," we view that "evidence in a light most favorable to sustaining the verdict." *McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d at 937. "If reasonable persons could differ as to whether the evidence establishes a fact in issue, then the evidence is substantial." *Id*.

¶3 The gravamen of Shannon's argument is that the evidence suggested the substance he had sold to an undercover officer was marijuana, not methamphetamine. The evidence he relies on includes his own testimony, the testimony of a defense witness, and what he insists is an ambiguity in the taped conversation between the undercover officer and Shannon. But the officer's testimony alone provided the jury with sufficient evidence to support its conclusion that Shannon had sold the officer methamphetamine, not marijuana. He insisted Shannon had sold him methamphetamine. And, with respect to that portion of the tape-recorded conversation where Shannon asserts the word "weed" was used, the officer testified he had said, "[A]re we good."[1] To the extent there were conflicts in the

[1]The tape, which is part of the record on appeal and which we have reviewed, appears to support the officer's testimony.

evidence, they did not render the evidence supporting the verdict insubstantial. *See State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) ("Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'"), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). Rather, it was for the jury to resolve such conflicts, after assessing the witnesses' credibility, and to weigh the evidence. *See State v. Walton*, 133 Ariz. 282, 293, 650 P.2d 1264, 1275 (App. 1982). The court did not err in denying the Rule 20 motion in this case. *See id*.

¶4 We also reject Shannon's challenge to the *Portillo* instruction. Our supreme court repeatedly has confirmed the propriety of the instruction it directed trial courts to give in *Portillo*. *See State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, ¶ 30, 984 P.2d 16, 26 (1999). This court must follow precedent set by our supreme court and cannot overrule its decisions. *See State v. Newnom*, 208 Ariz. 507, ¶ 8, 95 P.3d 950, 951 (App. 2004).

¶5 The conviction and the sentence imposed are affirmed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge